No. 97-174

In the

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the mere fact that Indian tribal government-owned land is freely alienable evidences unmistakably clear congressional intent to grant property tax jurisdiction to county governments, and, if so, whether the lands at issue in this appeal are freely alienable.

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STATEMENT OF THE CASE

This case arises out of the efforts of the Leech Lake Reservation tribal government to purchase land on its reservation to rebuild the tribal land base and strengthen tribal institutions. Twenty-one parcels of land were recently purchased by the tribal government in fee. The Leech Lake Band (hereafter the "Band") lost these and other lands during the allotment era of the late 1800s and early 1900s by the operation of the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1889) (hereafter "Nelson Act") (Res. App. at A-1-A-8).

The Nelson Act applied only to Minnesota and authorized the removal of land from tribal ownership by three methods. Some land was allotted to individual Indians pursuant to § 3 of the Nelson Act, which incorporated the procedures of the General Allotment Act of February 8, 1887 (also called the Dawes Act), ch. 119, 24 Stat. 388 (1887) (hereafter the "GAA") (Resp. App. at A-9-A-15). Some land was sold to non-Indians as pine lands under the specific and unique procedures of §§ 4 and 5 of the Nelson Act. Some land was conveyed to homesteaders pursuant to § 6 of the Nelson Act, which utilized the procedures of the general homestead laws. The parcels involved in this case include examples of each of these methods of disposal. Thirteen parcels were disposed of pursuant to § 3; seven parcels pursuant to §§ 4 and 5; and one parcel pursuant to § 6.

Prior to 1993, Cass County (hereafter the "County") did not impose ad valorem property taxes against tribal government fee lands. It only began to do so after this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). The Band brought suit to prevent such taxation, asserting that a local government had no jurisdiction to tax the property of a sovereign Indian government within its own reservation without unmistakably clear congressional permission.

With regard to parcels where the chain of title includes an allotment to an individual Indian under § 3 of the Nelson Act (utilizing the procedures of the GAA), the court of appeals held that it was bound by this Court's *Yakima* ruling. The court

interpreted *Yakima* to mean that Congress explicitly had granted jurisdiction to states to tax Indians and tribes in possession of such allotted lands. The court held that *Yakima* found a grant of jurisdiction in the combination of § 5 of the GAA and the 1906 Burke Act amendment to § 6 of the GAA. The court therefore ruled that *Yakima* required the conclusion that tribal governments, as well as individual Indians, could be taxed when they subsequently acquired such lands. The Band filed a Conditional Cross Petition for Writ of Certiorari on this aspect of the court of appeals decision, but this Court denied it on November 3, 1997.

With regard to the parcels of tribal fee land that originally were disposed of as pine lands or homesteads, the court of appeals held that it could find no indication of any congressional intent whatsoever in the Nelson Act or elsewhere to allow counties to tax a tribal government that owned such property. Consequently, the court ruled that traditional Indian law principles required the conclusion that a tribal government was immune from county taxation with regard to these parcels.

Cass County has argued that the Supreme Court's *Yakima* decision created what amounts to a new rule of tax jurisdiction applicable to all fee land, regardless of tribal ownership and regardless of the source of title. The County's interpretation is based on its presumption that if a tribe can alienate its land freely, there must be an implied congressional grant of jurisdiction to counties to tax a tribe for owning the land. The court of appeals rejected this interpretation, requiring more specific evidence of clear congressional intent than an implication derived from the alienability of land. The county filed a Petition for Writ of Certiorari seeking approval of its "alienability equals taxability" theory, arguing in part that the acceptance of this rule by the Court of Appeals for the Ninth Circuit created a conflict between circuits. *See Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

This Court granted Cass County's petition on October 31, 1997. The County's Petition questions the decision of the court of appeals to uphold the tax immunity of the Leech Lake tribal

government with regard to lands originally sold as pine lands under §§ 4 and 5 of the Nelson Act and as homesteads under § 6 of the Nelson Act--as opposed to lands originally allotted to individual Indians under § 3 of the Nelson Act pursuant to the procedures of the GAA. Accordingly, in this brief the Band will focus on the jurisdiction to tax the tribal government when it acquires lands that had once been conveyed as pine lands or homesteads.

SUMMARY OF ARGUMENT

The land at issue in this case is owned in fee by a tribal government and is located within the boundaries of an Indian reservation. The original Leech Lake Reservation in Minnesota was devastated by the policies of the allotment era, specifically the allotment and sales schemes of the GAA and the Nelson Act. Tribally owned land shrank to less than five percent of the reservation. *State v. Forge*, 262 N.W.2d 341, 343 and n. 1 (Minn. 1977), *appeal dismissed* 435 U.S. 919 (1977). In an effort to apply the policy goals of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.* (hereafter the "IRA"), and current federal Indian policy, the Band is attempting to rebuild its land base within its reservation. In the process it is rebuilding its tribal government and striving for economic self-sufficiency.

Cass County is imposing its property taxes on land purchased by the Band as part of its rebuilding effort. This is an attempt by one government to tax the property of another government. Several parcels of land that the County is attempting to tax were not originally allotments--unlike the lands at issue in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), which were all allotted to individual Indians pursuant to the GAA. Rather, several of the Leech Lake parcels in this case originally were sold by the methods specified in sections of the Nelson Act that contained no reference to the GAA or to taxation of tribal governments. The court of appeals ruled that Congress never explicitly granted jurisdiction to counties to tax a tribal

government that might come to own these non-GAA lands. The court of appeals was correct. The County's assertion of jurisdiction to tax a tribal government with respect to its fee lands within its own reservation is wrong for a number of reasons.

The primary reason that the County's tax is unjustified because Congress has never "with unmistakable clarity" given county governments the authority to tax the tribal government for ownership of the lands that are the subject of this appeal. The long-standing and widely-accepted rule of law in Indian taxation cases is what this Court has referred to as a "per se" rule against state or county taxation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987). As this Court concluded in *Yakima*, "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear." *Yakima*, 502 U.S. 251, 258 (1992) (internal quotation marks omitted). The "unmistakably clear intent" rule has a long history, is fully consistent with congressional policy and judicial decisions for almost 200 years, and is grounded in principles of tribal sovereignty and federal preemption. It has never been revoked, and it has been cited with approval as recently as 1995. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This rule applies here.

Cass County desires to tax the Leech Lake government with respect to land that originally was sold to non-Indians as pine lands under §§ 4 and 5 of the Nelson Act and as homesteads under § 6 of that act. There is not even a remote reference in these sections to taxing jurisdiction over Indian tribes that may eventually come into possession of such lands. Neither the district court nor the court of appeals could identify any unmistakably clear congressional language regarding taxation. Lack of any reference whatsoever can hardly be equated with "unmistakably clear intent." Cass County has not identified any express congressional language in the Nelson Act or anywhere else that shows an unmistakable intent to allow taxation of the Leech Lake tribal government if it came to own such lands. Hence, there is a jurisdictional bar against such taxation because

it directly impacts an Indian tribe within its reservation (Indian country).

In the absence of any unmistakably clear statutory language, Cass County has been forced to invent a new rule of Indian taxation. Its proposed rule is admittedly based on an "implication" derived from the alienability of land. This purported rule of an implied grant of taxing jurisdiction does violence to both Supreme Court precedent and congressional policy. Furthermore, although the County argues that its purported rule has been clear and in existence since 1906, the County itself apparently never recognized its authority until 1993 when it began to tax Indian fee lands.

This Court's opinion in *Yakima*, cannot be read as supporting the County's new rule for Indian taxation. As the court of appeals correctly concluded, the County's reading of *Yakima* fails to consider the language and context of the entire *Yakima* opinion.[1] *Yakima* specifically upheld and applied the unmistakably clear intent rule. The decision found such intent after a detailed analysis of the wording and history of both §§ 5 and 6 of the GAA. The special wording of the Burke Act in § 6 was of obvious importance. If a simple "alienability equals taxability" rule were intended by this Court, one would have expected a far shorter opinion, a concise statement of the "new" rule, a much less detailed analysis of the words of the GAA, and a discussion of the need to reverse or modify the "unmistakably clear intent" rule.

Part III of the *Yakima* opinion and the decision to remand are also inconsistent with the County's asserted rule. Part III suggests that the language of the Burke Act of 1906 authorized an ad valorem property tax but not an excise tax on the sale of land. If alienability does equal taxability, Part III should have come to a different conclusion. Also, if alienability means taxability, one

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[1] The conclusions of the Court of Appeals have been echoed by the Court of Appeals for the Sixth Circuit in its decision in *United States Ex rel. Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997), a case involving tribal land within the Saginaw Reservation.

would expect different conclusions from the many prior decisions of this Court that struck down state attempts to tax such freely alienable items as motor homes, automobiles, tobacco products, and even money. Finally, as recognized by the court of appeals, if *Yakima* stood for an alienability equals taxability rule, there would have been no need for a remand in that case.

Rather than creating the new implied tax jurisdiction rule advocated by the County, *Yakima* instead reaffirmed the unmistakably clear intent rule, analyzed specific statutory wording and history, and found language indicating unmistakably clear intent to grant jurisdiction. That should continue to be the process for handling cases of this type. If that process is applied to lands disposed of under the pine land and homestead provisions of the Nelson Act, it leads to the conclusion that Congress has granted the County no jurisdiction to tax tribal government lands.

Cass County's proposed implied tax jurisdiction rule also contradicts historic congressional treatment of Indian tax jurisdiction, threatens the ability of tribes to govern themselves, improperly imposes non-Indian values on Indian governments, is incompatible with the IRA's emphasis on rebuilding tribal land bases and the development of tribal self-sufficiency, and is inconsistent with current congressional policies. The County's proposed rule also reverses the long-honored canons of construction for interpreting federal Indian statutes. Rather than interpreting ambiguities to the benefit of Indian tribes, the County would turn ambiguities against tribes by allowing implications to be substituted for unmistakably clear expressions of intent.

In sum, the County has misread *Yakima* and has proposed a new rule of law that is at odds with Supreme Court precedent, the federal government's trust responsibilities to Indian tribes, and decades of federal Indian policy. The County has ignored the plain meaning of the phrase "unmistakably clear" by asserting that it means "implied but not expressly stated." It has turned Indian law presumptions upside down by asserting that, unless the United States owns the asset, states have implied jurisdiction over Indian tribes unless Congress says otherwise. The court of appeals correctly identified the errors of this "alienability equals

taxability" approach to the taxation of Indian tribal land. In each case, as in *Yakima*, the language of statutes should be analyzed in detail and a conclusion reached based on the presence of absence of express congressional language.

Therefore, the County's proposed "alienability equals taxability" rule should be rejected. However, even if it were adopted, the holding of the court of appeals in this case should be affirmed. This is because Leech Lake tribal fee lands are not freely alienable in light of the constraints of the Indian Nonintercourse Act, 25 U.S.C. § 177. The plain wording of that act shows that Leech Lake tribal lands are not freely inalienable, and past judicial interpretations as well as current policy support the conclusion that this statute prevents the free alienation of tribal lands.

ARGUMENT

I. THE "UNMISTAKABLY CLEAR INTENT" RULE DETERMINES WHETHER CASS COUNTY HAS JURISDICTION TO TAX TRIBAL LAND.

The general rule that applies to Indian tax disputes is well-established and should be beyond dispute: state governments and their political subdivisions do not have inherent jurisdiction to tax tribes and tribal property within reservations. Congress may grant this power, but such a grant cannot rest on a vague or general implication. Rather, Congress must make its intent unmistakably clear. *Yakima*, 502 U.S. at 258, citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17. The critical analytical question in this case, then, is whether Congress has indicated the requisite intent with the required clarity.

The immunity of Indian tribes from state or local taxation, at least in the absence of express congressional action to the contrary, extends back to the earliest days of our nation. Chief Justice Marshall first articulated the legal principle in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832), in which he wrote

that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ." Consequently, Marshall concluded, states generally have no jurisdiction within reservations.

In the mid-nineteenth century, the Supreme Court continued to follow the principles articulated by Chief Justice Marshall. In *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-57 (1867) and *The New York Indians*, 72 U.S. (5 Wall.) 761, 771-72 (1867), the Court ruled that states and their political subdivisions cannot tax Indian property inside reservations.

Over the years, this Court has acknowledged that Congress has plenary authority over Indian affairs and can grant states jurisdiction over reservations. *United States v. Wheeler*, 435 U.S. 313 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The Court also has modified Justice Marshall's purely territorial view of inherent sovereignty by viewing it as an important backdrop against which to apply the additional concepts of "federal preemption" and "infringement" on tribal self-determination. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973) and *Williams v. Lee*, 358 U.S. 217 (1959).

Nevertheless, throughout the 165 years since the *Worcester* opinion, this Court has steadfastly protected the rights of tribes to be free of state or local taxation within their reservations absent clear and unambiguous action by Congress. For example, within the last twenty-five years the Court has endorsed the unmistakably clear intent rule in at least eight decisions.

In *McClanahan*, 411 U.S. at 171, the Court said, "Indian property on an Indian reservation [is] not subject to state taxation except by virtue of express authority . . . by act of Congress."

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the Court said, "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation."

In *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985), the Court said that it "consistently has held that it will find the

Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Accord*, *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 183 n. 14 (1989). *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987), termed this a "per se rule" against state taxation of tribes and tribal members.

In the case relied on heavily by Cass County to justify its implication of taxability, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 258 (1992), the Court concluded, "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear" (internal references and quotation marks omitted).

Most recently, two decisions involving the Oklahoma Tax Commission have reiterated the rule. In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) the Court wrote, "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country . . . ." Two years later the Court reaffirmed what it termed a "categorical approach": "'[A]bsent cession of jurisdiction or other federal statutes permitting it, we have held, state is without power to tax reservation lands and reservation Indians.'" *Oklahoma Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting *Yakima*, 502 U.S. at 258).

Even when a grant of state jurisdiction is written in broad terms, this Court has refused to allow state taxation absent strong and specific congressional language. For example, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), a case involving the Leech Lake Reservation, the Court refused to find a grant of taxing authority in the broadly worded congressional grant of jurisdiction contained in Public Law 280, 28 U.S.C. § 1360. The *Bryan* Court held that even a broadly worded statute was not unmistakably clear enough to allow a county to impose a personal property tax on an Indian-owned mobile home--even though the mobile home was freely alienable.

The "unmistakably clear intent" rule thus has a long and consistent history. Not only is it supported by ample precedent, but it also is grounded in sound practical and political reasoning. Long ago, Chief Justice John Marshall analyzed the threats inherent in allowing one government to tax another. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), Marshall produced his famous formulation: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another . . . are propositions not to be denied." Marshall's fears about the power to tax remain relevant in Indian country today. The history of the United States is a history of conflict, and occasionally open hostility, between Indian communities and surrounding local non-Indian populations and governments. The power to tax tribal government property can be used to limit the development of reservations, to diminish tribal holdings, and to wring political concessions from tribes.

As part of its trust duties to protect Indian peoples, the United States has been diligent in protecting tribal governments from destructive incursions by surrounding non-Indian governments. Congress has been protective by limiting its grants of jurisdiction to states. The Supreme Court has been protective by requiring express congressional language before it will allow states to exercise important jurisdiction. The basis of the Court's long and consistent protection of tribes from state jurisdiction is found both in the tradition of tribal sovereignty, which represents "a deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control," *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (internal quotation marks omitted), as well as in principles of federal preemption. *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976). This helps explain the early development and consistent application of the "unmistakably clear intent" rule.

The unmistakably clear intent rule has been relied on for well over a century. There is no justification for changing or weakening it. It should remain intact and be applied to this case.

Cass County's approach is to change the rule through the back door. The County desires to establish an unmistakably clear intent by implication--not by direct statutory wording or express congressional action. To allow unmistakably clear intent to be proved by implication is to destroy the rule. The Court should not allow this to occur.

II. NEITHER THE NELSON ACT NOR THE GENERAL ALLOTMENT ACT EXPRESSES AN UNMISTAKABLY CLEAR INTENT TO ALLOW LOCAL TAXATION OF A TRIBE THAT PURCHASED LANDS ORIGINALLY SOLD TO NON-INDIANS AS PINE LANDS OR HOMESTEADS.

The court of appeals correctly held that Cass County does not have jurisdiction to tax tribal fee lands that originally were sold to non-Indians under the Nelson Act as pine lands or as homesteads. The County does not have such jurisdiction because no federal law, past or present, contains an unmistakably clear grant of authority to the County to tax these kinds of lands.

In *Yakima*, after an analysis of §§ 5 and 6 of the GAA of 1887, the Court found an unmistakably clear legislative intent to grant states taxing jurisdiction over lands allotted to individual Indians under that law. Since § 3 of the Nelson Act incorporated the provisions of the GAA, the district court and court of appeals concluded that *Yakima* required a holding that the parcels allotted pursuant to § 3 of the Nelson Act must also be taxable even when later purchased by a tribe.

However, §§ 4, 5 and 6 of the Nelson Act allowed lands to be sold to non-Indians as pine lands and homesteads. Sections 4, 5 and 6 (as well as the general homestead laws to which § 6 refers)[2] contain no reference to the GAA, contain no Burke Act

[2] The homestead laws themselves had absolutely nothing to do with Indian affairs or Indian reservations. Nowhere in the original Homestead Act of 1862, 12 Stat. 192, is there any reference to Indians or to taxation. The Homestead Act applied to "unappropriated public lands," and Indian lands did not fall into that category. *See United States v. Minnesota*, 270 U.S. 181, 206

proviso, and contain not even a hint of language about the taxability of such lands if they return to Indian ownership.

The entire history, purpose, and provisions of the Nelson Act dealt with the concentration of Minnesota's Indians and the disposition of surplus reservation lands[3], and not with the taxability of tribal governments. As described by the court of appeals (108 F.3d at 823; Pet. App. at 6) the Nelson Act allotted certain lands to Indians either at White Earth or on their home reservations (§ 3), and provided for the disposal of the surplus lands. The surplus lands were either sold at auction as pine lands (§§ 4 and 5) or were subject to entry under the homestead laws (§ 6).

The primary purpose of the Nelson Act simply was to provide allotments to individual Indians and to open the remaining reservation lands to non-Indian logging and settlement. There is no reference in the Act to taxation, to tribal governments, or to tribal rights and immunities. The Act did not terminate the Band, diminish the Band's governmental sovereignty, or alter the boundaries of the Leech Lake Reservation.[4]

(1926). Congress made extensive amendments to the Homestead Act in the Act of March 3, 1891, ch. 561, 26 Stat. 1097. Section 10 of the amended Act referenced Indians merely by stating "[t]hat nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States . . . ." Neither the original Homestead Act or the amendments to it created new law or indicated special intent with regard to taxation of Indian tribes.

[3] *See State v. Clark*, 282 N.W.2d 902, 905 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1979).

[4] Although the Nelson Act substantially reduced tribal land ownership in many of the Minnesota reservations to which it applied, both state and federal courts repeatedly have rejected the notion that the Nelson Act disestablished any Minnesota reservations. *See White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, 459 U.S. 1070 (1982); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (1971); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied* 445 U.S.

It is unlikely that Congress gave any thought to issues of taxation of tribal land. The assumed eventual, although not immediate, result of the federal allotment policies was that tribal governments would not survive, and that all Indians would be assimilated into non-Indian culture. *See Brendale v. Yakima Indian Nation*, 492 U.S. 408, 422-23 (1989); *Montana v. United States*, 450 U.S. 544, 559-60 n. 9 (1981).[5]

Since Congress was under the assumption that Indian tribal governments and tribal ownership would cease to exist at some future time, there was no need to think of, consider, or legislate about what would happen if surplus lands eventually went back into tribal ownership. This at most demonstrates a lack of consideration or intent; however, "lack of intent" falls far short of "unmistakably clear" intent. In order to equate the two, one would have to define away the "unmistakably clear intent" rule, impute to Congress an intent it could not possibly have formed or expressed given the historical setting, conclude that unmistakably clear intent really means intent by implication, and completely ignore canons of construction that require ambiguities to be construed in favor of Indian tribal rights.

The one certainty in this case is that the County can point to no language in the Nelson Act itself that even remotely refers to the taxation of pine lands and homesteads should they ultimately come into Indian tribal ownership. The district court could not find such language. It could only find taxing jurisdiction over

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904 (1979); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed* 435 U.S. 919 (1977).

[5] Undoubtedly, one of the ultimate goals of the allotment system was to break up tribal relations and tribal governments. In his treatise on Indian law, Felix Cohen called the allotment system "a systematic attempt to eradicate Indian heritage and tribalism." Felix Cohen, *Handbook of Federal Indian Law* 143 (1982 ed.) (hereafter "Cohen"). *See also Yakima*, 502 U.S. at 254. However, that would not happen immediately; fulfillment of these goals would come only by congressional action, presumably after all allotments had been made and all trusts had expired. *See Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Before the goals were achieved, Congress repudiated the allotment system and its policy underpinnings.

these lands by adopting an "alienability equals taxability" theory. Absent such a theory, the court agreed that there was no other indication that such lands could be taxed by the County. *See* 908 F. Supp. at 696-97; Pet. App. at 46-48. Similarly, the court of appeals could identify no language expressing congressional intent regarding taxation of pine lands and homesteads: "These sections of the Act [Nelson Act §§ 4, 5, and 6], unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee. These parcels are therefore not subject to state taxation." 108 F.3d at 829; Pet. App. at 22.

In the absence of an express statement of congressional intent in the Nelson Act, the Leech Lake tribal government should not be taxed for lands it now owns that originally left Indian ownership by means of pine land or homestead sales.[6]

III. THE STATUTE-SPECIFIC APPROACH OF THE COURT OF APPEALS, WHICH FOLLOWED THE APPROACH OF *YAKIMA*, REPRESENTS A WORKABLE APPROACH TO TRIBAL PROPERTY TAXATION ISSUES.

In order to find unmistakably clear congressional intent to allow county taxation of tribal property in any particular instance, a court must focus on the wording of the relevant legislation in its historic context. This fact-specific and legislation-specific analysis is what this Court undertook in its *Yakima* decision and is consistent with the unmistakably clear intent rule. It presents no insurmountable practical difficulties.

The court of appeals decision can be implemented in a completely straightforward fashion. The decision states that land originally allotted after 1906 to individual Indians under § 3 of the Nelson Act is taxable by Cass County under the rationale of the

[6] *See also Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981) (lands in Navajo Reservation originally homesteaded by a non-Indian held not taxable when subsequently acquired by Indian in fee).

Yakima decision; however, lands originally sold under other sections of the Nelson Act are not taxable when owned by the tribal government.

It is not difficult to determine how lands on the Leech Lake Reservation originally were disposed of. The task is little different from the analyses that title lawyers perform daily. Abstracts, patents, or county or federal land records are examined. These records show whether title to a particular parcel originated in a trust or fee patent given to an individual Indian, or whether it originated in a pine land sale or a homestead entry. If the parcel originally was allotted to an individual Indian, the appropriate county official can make the relevant notation concerning the taxability of the land. There is little mystery involved.

In any event, the burden on Cass County officials is minimal because, as a practical matter, the party claiming an exemption will bring that exemption to the County's attention. Hence, in order for tribal land to avoid tax assessment, the tribal government would have to present county officials with data and records substantiating that the land at issue was disposed of in ways other than allotment pursuant to § 3 of the Nelson Act. The county officials would merely have to receive the information, review it, and make the appropriate notations.

In fact, carrying out the court of appeals decision should be simpler than many other functions county officials must perform under Minnesota property tax laws. For example, Minnesota law exempts from real property taxation all public property exclusively used for any public purpose; wetlands (defined as land which is mostly under water, produces little if any income, and has no use except for wildlife or water conservation purposes); native prairie; property not exceeding one acre that is owned and operated by any senior citizen group; institutions of purely public charity; transitional housing facilities; academies; churches; and many other types of property difficult to identify without investigation--a total of twenty-nine separate exemptions. *See* Minn. Stat. § 272.02, subd. 1 (1997 Supp.). The Band suggests that it is probably more time consuming for the County

to make many of the above determinations than it will be to obey the court of appeals decision.[7]

Cass County and its supporting *amici* conjure up images of nightmarish administrative complexities that they suggest will flow from the court of appeals decision. *See* Brief for Pet. at 24; Brief of Amici States of Michigan, et al. at 2-3; Brief of Amici National Association of Counties, et al. at 24. However, their claims are limited to generalizations unsupported by real and detailed concerns. As discussed above, the determination that county officials will have to make are straightforward and probably less complex than many other determinations they must make under Minnesota tax laws. The current case illustrates the actual process that likely will occur. The Band identified in its Complaint the parcels at issue and their title histories. Cass County officials reviewed the information and concurred. This is what will happen under the court of appeals ruling, not the parade of horribles suggested by the County and its supporters.

[7] Likewise, the County's suggestion that determining the taxability of tribal fee land will unduly burden the assessment process and unduly complicate the Minnesota property tax scheme is not credible in the context of the overall Minnesota property tax scheme. As the Honorable Earl B. Gustafson, former Chief Judge of the Minnesota Tax Court, has observed,

> The Minnesota Tax Study found that Minnesota has the oldest and one of the most complex real property tax classification systems in the nation. It clearly has the greatest number of classes. Depending upon whether various credits are considered, the number of classes have been estimated from between 20 and 70.

Hon. Earl B. Gustafson, *Challenging Unequal Property Tax Assessments in Minnesota*, 13 Wm. Mitchell L. Rev. 461, 461-462 n. 1 (1987). Although the Minnesota property tax system has undergone reform since 1987, it remains an extraordinarily complicated system. The burdens of implementing the court of appeals decision are trivial compared to the systematic difficulties tax officials deal with routinely.

IV. THE FREE ALIENABILITY OF LAND, BY ITSELF, DOES NOT CONSTITUTE UNMISTAKABLY CLEAR INTENT TO ALLOW COUNTY TAXATION OF TRIBAL FEE LANDS.

A. Congress Historically Has Not Equated Alienability With Taxability.

The unstated premise of Cass County's proposed rule of implied tax jurisdiction is that Congress must have meant to make the terms "alienability" and "taxability" functional equivalents. In other words, when the term "alienability" was used, Congress meant it to include the idea of state taxability. However, Congress historically has treated each of these terms independently and separately, and this Court has been careful to recognize that the terms do not, in fact, mean the same thing.

In other allotment era legislation, Congress did not treat the terms "alienable" and "taxable" as synonymous. For example, in 1898 Congress provided for the allotment of land in "the Indian Territory"--lands that had been excluded from the operation of the GAA. It did this by means of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, which made definite distinctions between alienability and taxability. The Act provided specifically for the *nontaxability* of all allotments while the title remained in the allottee, but in addition it allowed a portion of each allotment to be chosen as a homestead. In addition to being tax exempt, the homestead was *inalienable* for twenty-one years:

> *All the lands allotted shall be nontaxable* while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent, and each allottee shall select from his allotment *a homestead* of one hundred and sixty acres, for which he shall have a separate patent, and *which shall be inalienable* for twenty-one years from date of patent.

30 Stat. at 507 (emphasis added). Congress used the concepts of nontaxability and inalienability distinctly and for separate purposes. Some lands were nontaxable but still alienable, but homesteads would be both nontaxable and inalienable. This demonstrates that Congress knew the difference between nontaxability and inalienability, and did not assume that one meant the other.

Similarly, in the Act of June 30, 1919, ch. 4, 41 Stat. 3, Congress authorized allotments on the Blackfeet Indian Reservation. The Act provided:

> That of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable *and* nontaxable until Congress shall otherwise direct. . . .

41 Stat. at 16 (emphasis added). Again Congress referred to alienability and nontaxability as two different matters, to be treated separately. If the concept of nontaxability was intended to be necessarily included in the concept of inalienability, the separation of the terms in the Blackfeet Act would not have been made.

A like distinction was made in 1920, when Congress passed the Act of February 25, 1920, ch. 87, 41 Stat. 452, which authorized allotments to members of the Flathead Nation of Indians. That Act provided, "That not exceeding forty acres of each allotment made under the provisions of this Act shall be designated as a homestead which shall be inalienable *and* nontaxable during the minority of the allottee, and thereafter until such *restrictions* may be removed either by Congress or the Secretary of the Interior." 41 Stat. at 452 (emphasis added.) Congress used the terms "inalienable" and "nontaxable"

separately and referred to them in the plural as "restrictions." They were not considered the same.[8]

The Supreme Court, even in the midst of the allotment era, acknowledged that alienability and taxability were separate concepts. In *Choate v. Trapp*, 224 U.S. 665 (1912)[9], the question was whether allotments given to members of the Choctaw and Chickasaw tribes could be taxed by the State of Oklahoma. The members of the tribes were allotted land under the provisions of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, as amended by the Act of July 1, 1902, ch. 1362, 32 Stat. 641. As discussed previously,[10] the Act provided that *all* allotted land should be nontaxable for up to twenty-five years, as long as title remained in the original allottee, but that the portion selected by the allottee as a homestead specifically would be inalienable for twenty-one years.

The 1902 amendments to the Curtis Act made the non-homestead part of the allotments alienable within 5 years after the issuance of patents for such land. Subsequent congressional legislation (the Act of May 27, 1908, ch. 199, 35 Stat. 312) removed restrictions on alienation and on taxation of such land. The Supreme Court held that the specific congressional promises of tax exemption could not be withdrawn unilaterally by the

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[8] Congress also referred to taxability separately in the Act of May 27, 1908, ch. 199, 35 Stat. 312, "An Act For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." Section 4 of that act stated specifically that "all land from which restrictions have been or shall be removed shall be *subject to taxation* and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes . . . ." 35 Stat. at 313 (emphasis added.) Again, taxability was treated specifically and separately from alienability.

[9] This was a decision issued six years *after* the decision in *Goudy v. Meath*, 203 U.S. 146 (1906), the case relied on so heavily by the County. The *Choate* decision may help in understanding the result of the *Goudy* decision, which relied on far more than a mere implication of taxability for its result. *See* discussion *infra* pp. 36-40.

[10] *Supra* pp. 17-18.

United States, and therefore Oklahoma could not tax the Indian land at issue.

The lesson of the *Choate* decision for the current appeal is contained in *Choate's* discussion of the separateness of the concepts of alienability and taxability. In *Choate*, 224 U.S. at 672, Oklahoma made essentially the same argument Cass County is making to this Court:

> In other words, it is said [by the state] that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act of 1908 (35 Stat. at L. 312, chap. 199), the provisions as to nontaxability went as a necessary part thereof.

To this argument, the Supreme Court replied simply, "*But the exemption and nonalienability were two separate and distinct subjects.*" *Id.* at 673 (emphasis added). The Court added, "The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for 16 years longer, if the Indian retained title during that length of time." *Id.* The Court concluded that, as to alienability and nontaxability, "neither was dependent on the other." *Id.* If alienability and taxability were considered different for purposes of conditions on grants of specific patents, they certainly should be considered different for the much more significant issue of a general congressional grant of state *jurisdiction* over all Indians and tribes within reservations.

An examination of the history of congressional and Supreme Court treatment of taxability of Indian lands thus reveals that taxability is not a necessary consequence of alienability. Cass County's assumptions to the contrary are unjustified. The rejection by the court of appeals of the "alienability equals taxability" rule was correct and in accord with past congressional and judicial treatment of those concepts.

B. Implied State Tax Jurisdiction Over Tribal Land Infringes On Rights Of Tribal Self-Government And Therefore Violates Judicial Precedent.

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). They possess the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). They are subordinate to "only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). These are among the reasons why courts have applied the "per se" rule against state taxation of tribes. That rule, by itself, should protect the Band here from any implied state tax jurisdiction.

However, even the more lenient rules developed by this Court for dealing with jurisdiction over non-Indian conduct within Indian country should also protect the Band here. State law does not even apply to non-Indians in a reservation if the state law infringes "on the right of reservation Indians to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). County taxation of tribal land infringes in several ways on the Band's ability to govern itself in its own manner. Even under the *Williams* standard relating to non-Indian conduct, such taxation would not be allowed by implication. The case against state taxation of tribal governmental assets is much stronger, and certainly infringement is much more direct.

Two particularly harmful effects of state taxation are the weakening of tribal powers of self-determination and the subjection of tribal lands to the pressure of non-Indian values and markets. Both result in significantly limiting the choices Indian tribes can make about the kind of society they want to foster and protect in their reservations. Both tend to confine tribes to alternatives defined primarily by non-Indian culture and are thus antithetical to the fundamental principle underlying the infringement doctrine--the right of Indian tribes, within their

territory, to choose their own path guided by their own culture and values.

The freedom of an Indian tribe to choose a uniquely Indian path requires that the tribe itself be preserved and that it have an effective means of making and implementing choices about the use of reservation lands and resources. Strong tribal governments are essential to this end. The ability to preserve a tribal land base is critically important to the maintenance of tribal self-government and meaningful tribal relations. The truth of this statement was tragically and dramatically demonstrated by the effects of the allotment system.

As discussed previously,[11] the one of the purposes of the allotment system was to break up tribal relations and tribal ownership of land. The system almost succeeded in that purpose. By 1934, when the Indian Reorganization Act brought a halt to further allotments, Indian tribes had lost almost two-thirds of the land they had held in 1887. *Yakima*, 502 U.S. at 255-56 (1992).

To see just how closely the erosion of tribal land base and the erosion of tribal sovereignty continue to be linked, one only need consider the recent decisions of this Court that deal with tribal government jurisdiction over lands lost during the allotment period. These decisions illustrate that tribal government jurisdiction is increasingly defined by tribal land ownership. For example, in *Montana*, 450 U.S. at 559-66, the Court held that the Crow Tribe could not regulate hunting and fishing by non-members of the tribe on lands inside the reservation that were owned in fee by non-Indians. The Court based this conclusion squarely on the fact that the tribe no longer had "absolute and undisturbed use and occupation" of these formerly tribal lands because they had been allotted and alienated "as a result of the passage of the GAA . . . and the Crow Allotment Act of 1920 . . . ." *Id.* at 559 (internal references omitted). *See also South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (conveying ownership "implies the loss of regulatory jurisdiction over the use of the land by others"); *State v. A-1 Contractors*, _____ U.S.

[11] *supra* n. 5.

_____, 117 S.Ct. 1404 (1997) (tribal court lacks jurisdiction over civil lawsuit against non-Indians for cause of action arising on non-Indian land); *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (Yakima Nation could not regulate the use of land owned by non-Indians inside the "open" portion of the reservation (i.e., that part of the reservation where the majority of the land had passed into non-Indian ownership by virtue of the allotment system)).

Given the significance the Court has accorded to land ownership in its recent tribal sovereignty decisions, it is plain that the impact of tribal land losses caused by the policies of the allotment period did not end with the repudiation of those policies in 1934. Tribal land continues to justify and support tribal sovereignty, while the erosion of the tribal land base frequently leads to erosion of tribal sovereignty. The threat of dispossession is an inherent and inextricable part of the state real estate tax system. To the extent that a tribe's efforts to reacquire land are inhibited by state taxation or tribal lands are taken through tax forfeiture, serious infringement on tribal self-government will necessarily occur. This infringement cannot be justified by implication.

State taxation of tribal lands also is a serious infringement on the tribal right of self-determination and welfare of the tribe because it determines who chooses how the land is used. In addition to supporting tribal governmental jurisdiction, land is a major asset for tribes, an asset that can be used to support economic and social development that is driven by Indian, rather than non-Indian, needs and priorities. The various protections against alienation enjoyed by Indian lands, including their immunity from taxation, have the net effect of preserving Indians' freedom to choose the way in which this fundamentally important asset will be used, and toward what ends.

Professor Robert Clinton argues persuasively that these protections have the impact of removing "tribal land from the American marketplace." Robert Clinton, *Isolated in Their Own Country: A Defense of Indian Autonomy and Self Government*,

33 Stanford L. Rev. 979, 1045 (1981). As he explains, this has particular relevance in the property tax context:

> The federally protected immunity from state real estate taxes helps ensure that Indian property resources remain insulated from the values and priorities set by the non-Indian market. Real estate taxes are generally assessed as a percentage of fair market value. The assessment of fair market value, while complex, obviously involves an evaluation of the manner in which the non-Indian market would value the property, which in part turns on the highest and best use to which the property could be subjected . . . . Thus, the state real property tax structures tend to encourage owners to put their property to the most productive uses the property will bear in order to pay the higher taxes on more valuable land. Since productivity of a parcel turns on demand factors which are influenced by cultural priorities, subjecting Indian land to state taxation tends to impose non-Indian economic values on the tribal land use decision, often to the detriment of Indians . . . .

Id. at 1045-46. For example, the Band may wish to preserve a grove of ancient pines for spiritual reasons, but the economic pressure of real estate taxes based on current high timber prices could force the Band to sell the timber to pay the taxes. Property tax considerations might similarly limit the Band's ability to deliver free or subsidized government services such as water, sewer, housing and medical care.

This obviously threatens tribal self-government and tribal welfare. The right of self-government must include the freedom of Indian tribes to make choices about how their economies and their communities will be ordered and run that may be different from the choices made by the states in which they are located.

The threats posed by county taxation are not theoretical. They were realized during the allotment period, and they are still

being realized today as the "train of evil consequences"[12] set in motion by the allotment system continues to unfold in the courts. Recently, one tribal sovereignty scholar made this direct connection between the loss of tribal land under the allotment system and the weakening of tribal self-government:

> Allotment had devastating effects because of its near destruction of the Indian land base . . . . Destruction of the tribal land base in turn contributed to the destruction of tribal identity and self-government on a number of reservations.

A. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U Pitt. L. Rev.1, 75-76 (1993).

In summary, state or county taxation infringes on the right of Indian tribes to govern themselves and develop their own economies. It does this by undermining the integrity of the tribal land base and the freedom of tribes to make their own choices about how best to use that land base. These threats are the reason the federal government and courts have given tribes protections that can only be overcome with the most explicit congressional language. Implied intent does not meet this test.

C. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Express Congressional Policies Contained In The Indian Reorganization Act And Therefore Violates Congressional Intent.

Since tribes were predicted to decline and disappear under the "mighty pulverizing engine"[13] of the allotment system, Congress had no need to express any intent with regard to land

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[12] Comm'n. Ind. Aff., 1934 Ann. Rep., extract reprinted in *Documents of United States Indian Policy* 225, (Francis Paul Prucha ed., 2d ed. 1990).

[13] The description is President Theodore Roosevelt's. 35. Cong. Rec. 90 (1906).

that might eventually make its way into tribal hands--so it expressed no intent. The lack of any intent in various parts of allotment acts (like §§ 4, 5, and 6 of the Nelson Act) falls far short of the requirement of unmistakably clear intent.

Current federal Indian policy suffers from no such uncertainty. By enacting the Indian Reorganization Act ("IRA") of 1934, Congress clearly repudiated the policies of the allotment era, and the assumptions underlying them. Commissioner of Indian Affairs John Collier, architect of much of the IRA, stated upon its passage: "One becomes a little breathless, when one realizes that the Allotment Law--the agony and ruin of the Indians--has been repealed."[14] Another commentator has characterized the IRA as "the death of . . . assimilationism" and its "primary objective" as being "not merely the termination of the allotment policy, but the restoration of the Indian tribe."[15]

The IRA created new policies, which continue in effect today, and which should inform this Court's interpretation of congressional intent. *See Bryan v. Itasca County*, 426 U.S. 373, 386 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-75 (1976). These new policies not only repudiated allotment era assumptions; they also expressed dramatically different congressional intent. This intent is to rebuild and protect tribal governments along with the land that supports them, and to encourage tribal independence--an intent that should act to prevent state jurisdiction over tribal government assets and operations in all but the most extraordinary circumstances.

Noted historian Francis Paul Prucha summarized many of the IRA's provisions as follows:

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[14] Quoted in Francis Paul Prucha, *The Great Father: The United States Government and the American Indian*, 962 (1984).

[15] Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 New Mexico L. Rev. 273, 319 and 321 (1997).

> The first sections dealt with land: further allotment was prohibited, existing trust periods and restriction on alienation for Indian land were indefinitely extended, remaining surplus lands could be restored to tribal ownership by the secretary of the interior, individual allotments could be voluntarily transferred to tribal ownership, and the secretary was authorized to acquire additional lands for reservations . . . .
>
> The law granted any Indian tribe the right to organize for its common welfare and to adopt appropriate constitution and bylaws, to be ratified by a majority vote of adult members of the tribe. Such an organized tribe would have powers to employ legal counsel, to prevent the sale or other disposition of tribal assets, and to negotiate with federal, state, and local governments.

Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 962-63 (1984).

The policy implications of the IRA were dramatically stated by Indian Affairs Commissioner John Collier in his 1934 Annual Report:

> The allotment system with its train of evil consequences was definitely abandoned as the backbone of the national Indian policy when Congress adopted and the President approved the Wheeler-Howard bill. *The first section of this act in effect repeals the GAA of 1887.* During numerous committee hearings, during several redrafts and modifications affecting every other part of the measure, this first section was never questioned or revised. It reached the President's desk in its original form without the change of a word or a comma, indicating that *Congress was thoroughly convinced of the allotment system's complete failure and was eager to abandon it as the governing policy.*

> The Wheeler-Howard Act . . . also endeavors to provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries.

Comm'r. Ind. Aff., 1934 Ann. Rep., *supra* n. 12 (emphasis added).

Rebuilding the tribal land base by the purchase and return of land within reservations was one of the primary remedial strategies recommended by Collier and adopted in the IRA.[16] The strengthened tribal land base was to be the foundation of new tribal governments, and presumably it would be protected from the kind of erosion that marked the allotment era.

Although this Court has said that the IRA did not formally repeal all allotment era statutes (*see Yakima*, 502 U.S. at 262), there is no doubt that it repudiated the assumptions of the GAA and the allotment era, and halted future use of those assumptions. In that respect, the IRA and more recent congressional legislation certainly should be used to help resolve ambiguities in allotment era legislation--an approach endorsed by this Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976). The Court noted, in interpreting ambiguities in Public Law 280[17], that:

> We are not obliged in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.

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[16] *See* S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934); Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. S.L.J. 1, 15-17 (1995) (Professor Royster also discusses in this article the failure of the judiciary to take the IRA into account when interpreting allotment era legislation.); Cohen at 147; Prucha, *The Great Father*, *supra* p. 28 at 954-63;

[17] 67 Stat. 588 (1953), codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1984).

Id. at 389 n. 14.[18]

The IRA's repudiation of the allotment system and allotment era policies should inform this Court's analysis of what is or is not unmistakably clear in the Nelson Act and other allotment legislation. Like the canons of construction, congressional repudiation of the allotment system and allotment era policies requires that ambiguities in the Nelson Act and related legislation be resolved in favor of tribal independence and the protection of tribal assets from state control, and that detrimental implications not be interpreted as express and unmistakably clear congressional grants of jurisdiction.

D. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Congressional Policy As Expressed In Recent Acts Of Congress And Therefore Violates Congressional Intent.

Since the passage of the IRA in 1934 (with a brief period of backsliding in the 1950's which generated Public Law 280), Congress and successive presidents have built on the IRA's foundation a framework of law and policy that supports tribal

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[18] *Bryan*, another case in which a Minnesota county attempted to collect taxes within the Leech Lake Reservation, is also relevant to the question of whether taxing authority can rest on an implication. In *Bryan*, Itasca County argued that the expansive congressional language in Public Law 280 gave it jurisdiction to tax the freely alienable personal property of an Indian within the Reservation. The *Bryan* decision, however, required even more explicit language in order to justify a state jurisdictional intrusion into Indian country. The decision considered the dangers posed to tribal governments by the county's interpretation, noted the current federal policy favoring tribal independence, and refused to "strain" to implement policies now rejected. The congressional language in the current appeal is more ambiguous than that considered in *Bryan*, Cass County's argument relies much more heavily on implication, and the allotment era policies have been rejected much more thoroughly and for a much longer time than the termination policies involved in *Bryan*. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harvard L. Rev. 381, 429-32 (1993).

independence and self-government within the protective framework of the federal trust responsibility for Indians. *See Yakima*, 502 U.S. at 255 (1992) (passage of IRA marked return "to principles of tribal self-determination and self-government"); *Santa Rosa Band Of Indians v. Kings County*, 532 F.2d, 655, 663 (9th Cir. 1975) ("The assimilation policy reflected in P.L. 280 was to a great extent a failure . . ., and has been discarded in favor of policies fostering Indian autonomy, reservation self-government and economic development."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 164, 172 (1987) (Indian self-sufficiency and economic development are the overriding goals of Congress); *Iowa Mutual v. LaPlante*, 480 U.S. 9, 14-15 (1987) (noting federal policy favoring tribal self-government).

The body of federal laws and policies that promote tribal self-government and self-sufficiency is too large to discuss in detail here[19], but a few highlights suffice to prove the point. In one of its most recent enactments on Indian affairs Congress expressly declared that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and further that "Congress through statutes, treaties and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian

[19] *See, e.g.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1995) (declaring Congressional "commitment to...the establishment of a meaningful Indian self-determination policy"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1995) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1995) (granting exclusive jurisdiction over Indian child custody to tribal courts); Tribal Self-Governance Demonstration Project Act of 1991, 25 U.S.C. § 450f (1995) (amending the Indian Self-Determination Act to provide devolution of federal program responsibilities and federal funding to several tribal governments); and Clean Air Act Amendments of 1991, 42 U.S.C. § 7602 (1995) (authorizing tribal governments to be treated as states for the purposes of adopting reservation air quality standards).

tribes." Indian Tribal Justice Act, Pub. L. 103-176, § 2, Dec. 3, 1993, 107 Stat. 2004, codified at 25 U.S.C. § 3601 (1997). All Presidents since Lyndon Johnson have been guided by similar policies. President Nixon's Special Message to the Congress on Indian Affairs of July 8, 1970, which recommended the formal end to the policy of termination, expressed what has come to be the clear and consistent policy of the Federal Government toward Indian tribes--promoting tribal self-government while preserving and carrying out its trust responsibilities. Pub. Papers 564, 565-66 (1970). President Carter expressed it this way in his 1979 State of the Union Address:

> The Federal government has a special responsibility to native Americans . . . . My administration . . . will ensure that the trust relationship and self-determination principals will continue to guide Indian policy.

Pub. Papers 121, 144 (1979). This policy remains in force today. *See* William J. Clinton, *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 30 Weekly Comp. Pres. Doc. 936 (May 2, 1994).

Cass County's rule of implied state tax jurisdiction flies in the face of an enormous amount of express congressional and executive branch policy extending from the passage of the IRA to the present day. The Court should not strain to adopt this rule in the face of such overwhelming policy directives to the contrary.

E. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To The Canons Of Construction Of Federal Statutes Dealing With Indians And Therefore Should Be Rejected.

The County's proposed rule of implied taxability based on alienability cannot be squared with the canons of construction used by this Court for well over one hundred years. Because of the unique status of Indian tribes in American law, and the federal government's trust responsibilities with respect to them, special

canons of construction have been applied to any case in which tribal rights and interests are at issue.

Professor Philip P. Frickey, in a scholarly analysis of the evolution of Indian law doctrine, summarized the effect of the canons in this way:

> Properly understood, the canons call upon the judge to become sensitized to the Indian interests in the case, to conceptualize a tribe as a distinct and sovereign political community under American domestic law, to reexamine the fit between routine Euro-American legal doctrines and the tribal context, to recognize a tradition of protection of Indian rights against all but crystal-clear encroachments, and to abandon obsolete congressional intent if later developments have a repudiated it.

Philip P. Frickey, *supra* n. 18 at 418 n. 158.

The canons of construction are well known to this Court and have been used often in cases past and present.[20] The canons, and the concepts summarized by Professor Frickey, will not permit the County's arguments in this appeal. The County's proposed rule--supported by implication--cannot survive the canons and their underlying rationale.

[20] The common formulations of the canons are: (1) that tribal governmental rights will not be abrogated absent plain and unambiguous statutory or treaty language (*see, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985) *reh. denied* 471 U.S. 1062 (1985)); (2) that ambiguities in statutes or treaties must be resolved in favor of and for the protection of tribal governments (*see, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Choate v. Trapp*, 224 U.S. 665, 675 (1912)); and (3) that statutes must be liberally construed in their application to Indian tribes in order to achieve the protective purposes of federal Indian policy (*see, e.g., Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

F. The *Yakima* Opinion Did Not Abolish the Unmistakably Clear Intent Rule and Substitute A New Rule Equating Alienability With Taxability.

1. The Court Of Appeals Correctly Rejected Cass County's Strained Reading Of *Yakima* And Correctly Interpreted The Decision As Requiring A Detailed Examination Of Statutory Language And Intent.

Cass County seeks to use this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), to provide support for its proposed alienability equals taxability rule. However, as the court of appeals in its detailed opinion recognized, the analytical framework of the *Yakima* decision simply is not consistent with such a rule.[21] There are four main reasons, all identified by the court of appeals, why the County's reading of *Yakima* is erroneous.

The first fallacy is identified by the court of appeals at 108 F.3d at 825 (Pet. App. at 12):

> [A]s the County concedes, its reading conflicts with the *Yakima* opinion itself and with Supreme Court precedent requiring Congress to provide unmistakably clear intent before allowing state taxation of Indians or their property.

In other words, the County concedes that alienability only *implies* taxability, and an implication by definition is not something that is "unmistakably clear."[22] The Sixth Circuit has reached precisely

[21] The County's interpretation essentially is a repetition of the rationale used in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994). Both *Lummi's* and the County's rationale is flawed for the reasons identified by the Eighth Circuit Court of Appeals and as further discussed in this brief.

[22] Webster's New Universal Unabridged Dictionary (2d ed. 1979), defines "imply" as "to indicate without saying openly or directly; to hint;

the same conclusion, as has the United States District Court for the District of Colorado. *United States Ex rel Saginaw Chippewa Tribe v. Michigan*, 106 F.3d 130, 133 (6th Cir. 1997); *Southern Ute Indian Tribe v. Bd. of County Commissioners of LaPlata County*, 855 F. Supp. 1194, 1200 (D. Colo. 1994) *vacated on ripeness grounds*, 61 F.3d 916 (10th Cir. 1995). The County's brief to this Court repeats the concession: "The issue in this case is whether Congress...gave its *implicit* permission to tax those lands notwithstanding the absence of express statutory language to that effect. Brief for Pet. at 11 (emphasis added).

The second fallacy, also identified by the court of appeals, is that the County ignores *Yakima's* repeated emphasis on the § 6 Burke Act proviso of 1906 as providing the confirming proof of

> congressional intent that may have been implied in the alienability provisions of § 5. [I]n order to support its argument, the County must read *Yakima* as resting its conclusion solely on the effect of the alienability section of the GAA. This reading disregards the significance given by the Court to the language of § 6 of the GAA. It repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County.

108 F.3d at 825 (Pet. App. at 12-13). The *Yakima* opinion spent a great deal of time analyzing the meaning of the Burke Act proviso, which is the only part of either § 5 of § 6 of the GAA that specifically refers to removing restrictions on taxation. If alienability by itself were a sufficient indication of unmistakably clear intent, the time spent on the Burke Act and § 6 would have been unnecessary. The opinion could simply have announced at the beginning that alienability equals taxability and have stopped there. Again, the Sixth Circuit reached a similar conclusion.

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suggest; intimate . . . ." It tortures the language to equate "imply" with making something "unmistakably clear."

Saginaw, 106 F.3d at 133 ("The Yakima court relied on this explicit taxation language [in § 6] throughout its opinion . . . .")

The third fallacy of the County's reading of *Yakima* is that it is unreconcilable with Part III of the opinion, which allowed the ad valorem property tax but prohibited the excise tax on land sales. Again, the court of appeals correctly analyzed the issue:

> If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA. Instead, the Court refused to uphold the excise tax because it found that the language of the Burke Act proviso could not justify the imposition of such a tax . . . . Under the County's reading of *Yakima*, section III of the opinion would be superfluous and the Court would have reached a different result.

108 F.3d at 826 (Pet. App. at 13). *See also Saginaw*, 106 F.3d at 134. The detailed analysis of the Burke Act language in the Part III *Yakima* analysis again demonstrates that the applicable analytical approach in cases like these is a detailed statutory and historical analysis, and not reliance on a vastly oversimplified but easily stated rule.

The fourth significant fallacy in the County's reading of *Yakima* is that it ignores the significance this Court's order for remand. The court of appeals accurately pointed out:

> That remand left open the question of whether land allotted under a different act might be taxed or not. If alienability equaled taxability it should not have mattered under which act the land was made alienable--the mere fact of alienability should have been enough to allow state taxation.

108 F.3d at 826 (Pet. App. at 14). *See also Southern Ute*, 855 F. Supp. at 1200. ("if alienability were the only test, the court would not have left open the question in *Yakima* whether patenting under an act other than the General Allotment Act would require a different result"). The *Yakima* remand makes no sense if the sweeping new rule advocated by the County were intended by this Court.

Cass County has misread the approach, analysis, and end result of the *Yakima* opinion. It had to do so in order to justify its taxation of pine lands and homestead lands now owned by the Leech Lake tribal government. However, *Yakima* should provide no help to the County. *Yakima's* approach was careful, detailed, and followed strong precedent in the field of Indian taxation. The County's re-casting of the decision should not be accepted.

2. The Court Of Appeals Correctly Concluded That The *Goudy* Decision Does Not Require A Rule Equating Alienability With Taxability.

A recurring argument of Cass County is that the 1906 opinion of the Supreme Court in *Goudy v. Meath*, 203 U.S. 146 (1906) sets forth the rule that alienability equals taxability. However, that is not what the *Goudy* opinion concluded, and that is not what the *Yakima* opinion said it concluded. Alienability in *Goudy* was, as the court of appeals here put it, a "contributing factor," 108 F.3d at 828 n. 10, to the conclusion that the land in that case was taxable, but it was not the only factor, and it was not sufficient by itself. The County extends the importance of *Goudy*, a relatively minor, fact-specific opinion, far beyond its actual reach.

Several factors were important in the *Goudy* decision. Among the most important was that Goudy himself was considered to be, not an Indian, but a "citizen of the United States." The Washington Supreme Court considered him to be a citizen because "he has entirely severed his tribal relations, and is a citizen of the United States, with all the privileges and immunities of any other citizen." *Goudy v. Meath*, 38 Wash. 126,

127, 80 P. 295, 296 (1905). The Washington Supreme Court referred to Goudy as "formerly a member of the Puyallup tribe." The Supreme Court also considered him to be a citizen because of the additional language of § 6 of the GAA:

One of the facts agreed upon is the following:

> "That since the issuance of said patent, and by an act of Congress passed and approved on the 8th day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizens."

Goudy, 203 U.S. at 147, quoting the agreed statement of facts submitted by the parties to the state courts. This was a significant factor because by abandoning tribal relations and becoming a "citizen", Goudy had lost his rights to his inherent immunities as an Indian--including his right to be free of state taxation absent congressional approval.[23]

Once Goudy became a "citizen", the normal taxation rules applied to him, which meant that without an exemption he and his property were taxable. His only arguable exemption was in his property document, the land patent, which restricted the land's alienability. The restrictions on his patent were separate property law protections and were his regardless of whether he was an Indian. When the restrictions on his land were released in 1903, Goudy had nothing left to protect him from taxation. His jurisdictional ("political") protection was no longer available because he was considered by the court to be a "citizen" and not an "Indian", and his patent no longer protected him because its

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[23] This was the law the time of *Goudy*: if an Indian became a citizen, then he lost his "political" protection as an Indian. *See In re Heff*, 197 U.S. 488 (1905). Some years after *Goudy*, the Supreme Court overruled the conclusion of the Court in *Heff* that one could not be a citizen and also have the federal protection that was given to Indians. *See United States v. Nice*, 241 U.S. 591 (1916).

time restriction had expired.[24] "Alienability" did not remove the jurisdictional bar against state taxation--that bar was removed by citizenship. Another important factor in the *Goudy* decision was the following provision of *Goudy's* patent, quoted in the opinion of the Supreme Court of Washington:

> [T]hat the United States . . . has given and granted . . . the tracts of land above described, but with the stipulation . . . that the said tracts shall not be alienated or leased for a longer period than two years and shall be exempt from levy, sale, or forfeiture, which provisions shall continue in force *until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the state shall remove the restrictions*, and no state legislature shall remove the restrictions without the consent of Congress."

Goudy, 38 Wash. at 127-28, 80 P. at 296 (emphasis added). In 1889 the State of Washington adopted a constitution, and in 1890 the state legislature passed an act which stated that any Indians holding lands in severalty would have all restrictions relating to them and the land removed, and that the Indian landowners would be treated just as any other non-Indian person. The Secretary of the Interior declared that Congressional consent to the state law was granted as of 1903, and the state law was in effect when Goudy brought his lawsuit. *See Goudy*, 38 Wash. at 129, 80 P. at 296.

The state law removed all restrictions on the land and recognized the power of the allottee to "incumber" and "alien" the land just as other citizens. The existence of this complicated combination of patent language and state legislation also undoubtedly influenced the *Goudy* court's decision.

It is important to understand that the *Goudy* court also performed an analysis similar to that performed by the *Yakima* court. It certainly believed that by making land alienable there was an *implication* of intent to allow taxation (the same implication that existed in § 5 of the GAA). However, even the *Goudy* court looked for more. Among other places, it found the additional evidence it needed in § 6 of the GAA:

> But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. That act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside. Matter of Heff, 197 U.S. 488.
>
> Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation.

[24] Justice Brewer, who authored the *Goudy* opinion, believed that "citizenship" removed an Indian from the federal jurisdictional protections against state action. Brewer was also the author of *In re Heff*, 197 U.S. 488 (1905), decided one year before *Goudy*. (*In re Heff* was the decision finding that allottees became subject to state laws immediately upon receiving a trust patent.) In *Heff*, Justice Brewer repeatedly used the § 6 GAA grant of citizenship (and corresponding declaration that allottees shall be subject to the laws of the states) as the rationale for ending federal jurisdictional protection of Indians:

> We do not doubt . . . that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the state of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that state.

Heff, 197 U.S. at 505. When read together, *Heff* and *Goudy* show that Justice Brewer felt that Goudy's status as a citizen took away the jurisdictional protections given him by virtue of his *political* status, and left him only with his patent conditions which expired in 1903. *See*, e.g., Justice Brewer's statement in *Heff*, 197 U.S. at 509:

> But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title.

Goudy, 203 U.S. at 149. Hence, the *Goudy* opinion looked for additional indications of intent beyond the mere fact of alienability. It found such additional indications in the § 6 citizenship provisions of the GAA, in the Washington state legislation contemplated in the patent itself, and in *Goudy's* renunciation of his tribal relations--which removed him from the special jurisdictional protections given to Indians. In short, the Court in *Goudy* performed the same kind of historical and legislative analysis as in *Yakima*. It did not simply set out a new rule at the beginning of its opinion that any time land is alienable by an Indian it is taxable by the state.

The final indication of Cass County's misreading of the *Goudy* decision is the subsequent history of that decision. In all the years since *Goudy*, the Supreme Court has continued to apply the "per se" rule against Indian taxation. It has always rejected the assertion of state taxing authority over Indians on reservations when that authority was not based on an unmistakably clear congressional delegation.[25] Most of these cases involved property that clearly was freely alienable.[26] No subsequent case has articulated the overly simplistic rule for which the County cites *Goudy* as authority. That is because *Goudy* did not reformulate Indian tax principles in the manner the County wishes it had. Instead, *Goudy* did what courts throughout the years have done, and what this Court did in *Yakima*--it engaged in a detailed analysis of legislation and history in search of an unmistakably clear indication of congressional intent.

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[25] *See* cases and argument *supra* pp. 7-11.

[26] *E.g.*, motor homes (*Bryan v. Itasca County*, 426 U.S. 373 (1976)); automobiles (*Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)); tobacco products (*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)); and money (*McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)).

V. EVEN IF ALIENABILITY DETERMINES TAXABILITY, TRIBAL FEE LAND CANNOT BE TAXED BECAUSE THE INDIAN NONINTERCOURSE ACT RENDERS IT INALIENABLE.

A. The Plain Language Of The Indian Nonintercourse Act Protects All Tribal Lands From Alienation Without The Consent Of The United States.

Indian Tribes enjoy an additional protection for their lands not shared by individual Indian landowners--the comprehensive restraint on alienation imposed by the Indian Nonintercourse Act, 25 U.S.C. § 177 (hereafter "INA" or § 177")).[27] So far as relevant, § 177 provides:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

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[27] The ancestor of 25 U.S.C. § 177 was the Trade and Intercourse Act of 1790 (Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137) , a temporary measure renewed in 1793, 1796 and 1799. The first permanent Trade and Intercourse Act was enacted in 1802 (Act of March 30, 1802, ch. 13, 2 Stat. 139). The 1802 act, as amended, became the basis for the Trade and Intercourse Act of 1834 (Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730), which, in turn, is the source of 25 U.S.C. § 177. Prior to the 1834, amendments the INA applied to purchases or grants of land from "any Indians or nation or tribe of Indians." *See, e.g.*, Section 4 of the 1790 Act. In 1834, however, Congress restricted the scope of the restraint to "any Indian nation or tribe of Indians." Act of June 30, 1834, ch. 161, § 12, 4 Stat. 161. *See Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291, 1299 (4th Cir. 1983). ("Henceforth the Nonintercourse Act afforded protections only to the land of Indian tribes.") The lands at issue in this appeal obviously are owned by a "tribe of Indians."

The meaning of this language is as plain and unambiguous as it is inclusive.[28] It expressly includes "any title or claim" to Indian tribal lands. As the Attorney General of the United States noted in an 1885 opinion:

> [T]his statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be fee simple, or a right of occupancy merely, is not material; in either case the statute applies.

18 Op. Att'y Gen. 235, 237 (1885). This is the plain meaning of the phrase "any title or claim."[29] Had Congress intended to limit the application of the INA to the right of occupancy usually referred to as "Indian title," to "treaty title" or to any of the other

[28] It is an elementary and frequently cited rule of construction that when a statute is to be interpreted, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 475 (1992). *Accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981). Each term of the statute must be construed "in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994). *Accord United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994).

[29] Courts have consistently recognized and applied the plain meaning of the words of § 177. *See, e.g., Joint Tribal Council of the Passamaquody Tribe v. Morton*, 388 F. Supp. 649, 660 (D. Maine 1975) ("The Court holds that the Nonintercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquody Indian Tribe."); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980) ("The Nonintercourse Act, containing no language of limitation, must then be read as applying to all Indian lands."); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1313 (N.D.N.Y. 1983) ("The language of the 1793 and 1802 Nonintercourse Acts reveals no ambiguity whatsoever as to their geographic scope."), *aff'd.* 528 F.2d 370 (1st Cir. 1975).

sources of tribal interests in land[30], it surely would have used a more precise term. Certainly, the concepts of "Indian title" and "treaty title" were commonly employed to describe tribal land tenure during the formative period of the INA. *See Flecher v. Peck*, 10 U.S. (6 Cranch) 87, 142 (1809); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-92 (1823).

The language also applies to all of these interests in land *however alienation occurs*, whether by "purchase, grant, lease or other conveyance." This must necessarily include forced sales for the benefit of creditors, including tax forfeitures. Cohen put it this way:

> Another consequence of the restraints on alienation is the inability of states to transfer title by foreclosure sale in the process of enforcing mortgage obligations *or for non-payment of taxes*.

Cohen at 520 (emphasis added).

B. The Plain Meaning Of The Indian Nonintercourse Act Is Consistent With The Purpose Of The Act.

The "obvious purpose" of the INA "is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress . . . ." *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 119, *reh. denied* 363 U.S. 956 (1960). Thus, the Act serves to preserve the tribal land base from erosion. In the context of current threats to Indian land, Cohen notes that § 177 continues to serve a vital purpose by protecting tribal lands from non-Indian market forces: *"If tribal land were not subject to restraints on alienation and tax*

[30] Cohen identifies "at least six ways" in which interests in land have been acquired by Indian tribes: " (1) by action of a prior government; (2) by aboriginal possession; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase." Cohen at 472.

immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation ... ." Cohen at 509 (emphasis added). Cohen rejects the notion that this protection is "overly paternalistic" because

> ... a different justification has gradually emerged for the retention of the restraints. Federal policy makers increasingly view preservation of a substantial tribal land base as essential to the existence of tribal society and culture. As an historical matter, moreover, it can be argued persuasively that the early treaties represented a contractual undertaking by the United States to protect unceded lands in Indian ownership, as a zone where Indians could exercise at their option their culture and traditions with reduced interference from the mainstream society. To some extent a federal policy of continuing restraints on alienation of Indian lands represents congressional deference to principles of tribal self-determination.

Id.[31]

The INA protects tribal land base, tribal values, and tribal self-determination from the incursion of surrounding non-Indian communities and non-Indian economic forces. It is important enough to have been called "a cornerstone of the modern federal trusteeship over all Indian land. " Robert N. Clinton and Margaret Tobey Hotopp, *Judicial Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Maine L. Rev. 17, 19 (1979).

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[31] This is not so much a "different interpretation" as an application of the purpose of the INA to current conditions. Speaking of the terms of § 177, the court in *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1326 (N.D.N.Y. 1983) said, "[I]t is a cardinal rule of construction that a statute framed in general terms embraces conditions arising in the future not known at the time of enactment. *DeLima v. Bidwell*, 182 U.S. 1, 197 (1900); *United States v. Browder*, 113 F.2d 97, 99 (2d Cir. 1940)."

Given this purpose, there is no logical basis for distinguishing between Indian lands for INA purposes based on the kind of title held by an Indian tribe--any loss of land regardless of how a tribe acquired it is equally incompatible with the congressional purpose of providing "maximum protection of Indian land." *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 534 (2d Cir. 1983), *aff'd in part, reversed in part on other grounds, sub nom. County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, *reh. denied* 471 U.S. 1062 (1985) (holding that in enacting the INA Congress contemplated that Indians would have a private right of action to enforce it even though the Act did not expressly provide such a right). Based on similar reasoning and in light of the plain meaning of the statutory language, courts have consistently refused to narrow the reach of the INA. *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) (INA restraint on alienation meant to apply throughout the United States, not just in "Indian Country"); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1312-15 (N.D.N.Y. 1983) (The INA applies to so-called "preemption states" such as New York); *Narragansett Tribe of Indians v. Southern R. I. Land Dev. Corp.*, 418 F. Supp. 797, 808-09 (D.R.I. 1976) (so-called "white settlement" exception to INA applies only to transactions by individual Indians living in white settlements, not to tribes); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd on other grounds, sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (following and expanding on *Narragansett*); *Mayes v. Cherokee Strip Livestock Ass'n*, 58 Kan. 712, ____, 51 P. 211, 216-17 (1897) (§ 177 applies to grazing leases).

C. Courts Have Consistently Construed The Plain Language Of The Indian Nonintercourse Act To Include Fee Lands.

In spite of the plain language of the Act and the repeated refusal of courts to limit its scope, the County will undoubtedly argue that tribal fee land is not protected by the INA. This argument is not supported by logic or precedent.

As noted above, there is no basis for granting or withholding the protections of the INA based on the nature of a tribe's interest in land or its source of title. The underlying purpose of the INA, namely to provide maximum protection to Indian land, is fulfilled whether the tribe has fee title, Indian title, treaty title, or any other interest in land or whether it has acquired its land by occupancy, grant, or purchase.

Overwhelmingly, courts that have considered this issue agree. Summarizing the current state of the law on this point, the United State Court of Appeals for the Fifth Circuit recently concluded, "The Nonintercourse Act protects a tribe's interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state." *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (citations omitted).[32]

The line of cases cited in *Tonkawa* can be traced back to 1913 when the United States Supreme Court decided that federal Indian legislation applied to lands held in fee simple by the New Mexico Pueblos just as it did to fee lands owned by the Five

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[32] In their article discussing § 177's restraints on alienation, Clinton and Hotopp reach the same conclusion:

> The statute [§177] by its terms applies to any conveyance of Indian land or any title or claim thereto. It is generally understood that the sweeping scope of the Act *includes all lands occupied by an Indian tribe irrespective of when or how the lands were acquired.* Furthermore, the statute generally covers any sort of conveyance or alienation of an interest in real property.

Clinton and Hotopp, *supra* p. 44 at 69 (emphasis added).

Civilized Tribes, which implied that § 177 would apply to these lands. *United States v. Sandoval*, 231 U.S. 28 (1913) (specifically dealing with laws prohibiting the introduction of intoxicating liquor into Indian country). This Court's decision in *United States v. Candelaria*, 271 U.S. 432 (1926) removed any doubt on this point by holding expressly that the INA applies to Pueblo lands even though they are held by fee simple title. This Court similarly assumed in *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 118-21 (1960) *reh denied*, 363 U.S. 956 (1960) that the INA applies to tribal lands, whether or not they are held in fee simple.

Lower federal courts over many years also have held § 177 applicable to tribal fee lands. *See, e.g., United States v. 7.405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938) ("[I]t makes no difference that title to the land in controversy was originally obtained by grant from the state of North Carolina, or that the Indians are citizens of that state and subject to its laws."); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) *cert. denied*, 355 U.S. 940 (INA protects grants made by governments of Spain and Mexico and by purchase); *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984) ("[T]he Pueblos are entitled to the same protection as other tribes regardless of their fee simple title, and the intent of Congress to provide such protection cannot be doubted."); *Joint Passamaquody Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (INA protects grants by a state to a tribe); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp 527, 538 (INA protects land reserved for tribe in treaty with New York prior to ratification of United States Constitution), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985).

Alonzo is particularly relevant here. There, the 10th Circuit Court of Appeals held unequivocally that "the restrictions against alienation apply to lands acquired by the Pueblo [of Laguna] through purchase, as well as to lands acquired in any other manner." *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir.

1957). The court based its interpretation of the INA squarely on the purpose of the Act:

> [T]he reason for the imposition of the restrictions [contained in § 177] is in nowise related to the manner in which the Indians acquired their lands. The purpose of the restrictions is to protect the Indians . . . against the loss of their lands by improvident disposition or through overreaching by members of other races.

Id. That same reasoning supports the application of the INA to the Band's fee lands.

D. Congress Has Recognized That The Indian Nonintercourse Act Protects Fee Land.

Congress itself has recognized that § 177 restraints on alienation apply to and protect tribal fee land. It has done so, not just once, but on several occasions.

For example, 1960 Congress amended the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635.[33] The amendment, among other things, expressly lifted § 177's restraints, and authorized the Navajo Tribe to dispose of its fee lands without federal approval. *See* P.L. 86-505, § 1, 74 Stat. 199, codified at 25 U.S.C. § 635(b) (1983). The legislative history of the law is significant because it demonstrates that Congress, too, considered § 177 applicable to tribal fee lands, and understood that it had to expressly lift § 177's restrictions in order to let the tribe alienate the property. In the words of the House Report on the bill that became the Navajo-Hopi Rehabilitation Act:

[33] It is well-established that a "later legislative act can be regarded as a legislative interpretation of an earlier act and 'is entitled to great weight in resolving ambiguities and doubts.'" *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) and *United States v. Stewart*, 311 U.S. 60, 64-65 (1940).

> The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. *Tuscarora Indian Nation v. Federal Power Commission*, 265 F.2d 338 (C.A.,D.C. 1958); *Tuscarora Nation v. Power Authority of the State of New York*, 257 F.2d 885 (C.A.2, 1958). This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its free [sic] simple lands as it wishes.

H.R. Rep. No. 1648, 86th Cong., 2d Sess., 1960, *reprinted in* 1960 U.S.C.C.A.N. 2352.

Similarly, in Public Law 101-630, 104 Stat. 4531, passed in 1990, Congress expressly authorized the sale of a single parcel of land owned in fee simple by the Rumsey Indian Rancheria. Section 101(5) of that Act explained the need for the authorization: "Section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress". The House Committee Report accompanying the Act reaffirmed that the Act was necessary because conveyance of lands owned by Indian tribes is prohibited without the consent of Congress. *See* H.R. Rep. No. 687, 101st Cong., 2d Sess., 1990. *See also* Pub. L. 101-379, 104 Stat. 473, § 11 of the Indian Law Enforcement Reform Act of 1990 (authorizing the Eastern Band of Cherokee Indians to convey its interest in a business known as Carolina Mirror, Inc., which included an interest in land, "notwithstanding any other provision of law"); Pub. L. 102-497, § 4, 106 Stat. 3255, (authorizing Mississippi Band of Choctow Indians to convey its fee interest in lands acquired from National Disposal Systems, Inc. in Mississippi, "notwithstanding any other law", with the committee

report noting that "the Bureau of Indian Affairs cannot dispose of the property without Congressional approval." S. Rep. No. 428, 102 Cong., 2d Sess., 1992, *reprinted in* 1992 U.S.C.C.A.N. 2620); Pub. L. 103-435, § 4, 108 Stat. 4566, 4568-69 (authorizing sale of land owned by Ysleta Del Sur Pueblo "in accordance with" 25 U.S.C. 177); Pub. L. 102-575, § 503, 106 Stat. 4600 at 4652 (expressly exempting Ute Water rights settlement from the application of § 177); Pub. L. 103-116, § 13, 107 Stat. 1136 (authorizing the Catawba Indian Tribe of South Carolina to acquire lands outside its reservation and exempting such lands from § 177).

Thus, Congress frequently has recognized that it must expressly lift the restraints imposed by § 177 in order to make tribal fee land freely alienable. Since Congress has never exempted the Band's fee lands from the application of § 177, they are not freely alienable.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

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